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Indiana Law Journal

Volume 87 | Issue 1 Article 14

Winter 2012

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Recommended Citation
Befort, Stephen (2012) "Public-Sector Employment Under Siege," *Indiana Law Journal*: Vol. 87: Iss. 1, Article 14.
Available at: http://www.repository.law.indiana.edu/ilj/vol87/iss1/14

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Public-Sector Employment Under Siege

STEPHEN F. BEFORT*

INTRODUCTION

Professor Joseph Slater's presentation adopted a "best of times, worst of times" theme.[1] But while he accurately notes the high union density rates in the public sector,[2] it is clear that the bad news concerning public employment currently predominates over the good news. Whatever high hopes there may have been for progressive advances when President Obama first took office, current public-sector employment can aptly be described as being under siege.

As Professor Slater vividly describes in his article, the principal culprits at work are the continuing economic recession and the resulting widespread governmental budgetary woes.[3] The economic downturn has imposed a double whammy on public employers in the form of reduced tax revenues and lower stock values in pension fund holdings.[4] State governments in 2010 are in the worst fiscal shape since the Depression.[5] Economic conditions deteriorated dramatically for state and local governments during 2009,[6] continued in 2010,[7] and are expected to worsen in 2011.[8] Governor Arnold Schwarzenegger's "Great California Garage Sale"[9] symbolizes the desperate economic conditions faced by the forty-eight states that experienced a deficit in 2009.[10] During its two-day sale, California sold nearly six hundred state-owned vehicles, office furniture, computers, electronics, jewelry, pianos, a surfboard, a food saver, and an Xbox 360 gaming system.[11] Despite these efforts, the state was forced to issue IOUs worth $1.95 billion.[12]

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1. Joseph E. Slater, *Public Sector Labor in the Age of Obama*, 87 IND. L.J. 189 (2012).
2. *Id.* at 189.
3. *Id.* at 192–94.
4. *Id.* at 194.
5. Bob Herbert, Op-Ed., *Invitation to Disaster,* N.Y. TIMES, Jan. 9, 2010, at A19.
6. *See* NAT'L GOVERNORS ASS'N & NAT'L ASS'N OF STATE BUDGET OFFICERS, THE FISCAL SURVEY OF STATES (June 2009), *available at* http://www.nasbo.org/LinkClick.aspx ?fileticket=4EBD8IQRaXw%3d&tabid=106&mid=566&forcedownload=true.
7. *See* NAT'L GOVERNORS ASS'N & NAT'L ASS'N OF STATE BUDGET OFFICERS, THE FISCAL SURVEY OF STATES (June 2010), *available at* http://www.nasbo.org/LinkClick.aspx ?fileticket=gxz234BlUbo%3d&tabid=106&mid=566&forcedownload=true.
8. Judy Keen, *States Braced to Tighten '10 Belts; $14.8B in Shortfalls May Deepen Cuts*, USA TODAY, Jan. 5, 2010, at 1A.
9. Judy Lin, *California Hopes Garage Sale Will Put Funds into State Coffer: Bargains Galore, Even a Surfboard*, BOS. GLOBE, Aug. 29, 2009, at A9.
10. *State Budgets in Crisis: Happy New Year: The Pain of Balancing Budgets*, ECONOMIST, July 4, 2009, at 27.
11. Lin, *supra* note 9, at A9.
12. Matthew Yi, *Era of IOUs Is Ending, Controller Proclaims; State Budget Fallout*, S.F. CHRON., Aug. 14, 2009, at D1.

With nearly every state required to maintain a balanced budget,[13] state and local governments have scrambled for ways to reduce costs. Not surprisingly, public employers frequently took aim at their workforce costs, one of their most significant discretionary expenses.[14] Governmental employers have resorted to layoffs, hiring freezes, wage freezes, and employee furloughs, among other options, in order to reduce personnel expenditures.[15]

Political fallout has accompanied the economic fallout. The *Wall Street Journal*, for example, has stated, "America's most privileged class are public union workers."[16] Former Minnesota Governor and presidential candidate Tim Pawlenty, in an op-ed piece, argued that the moral case for unions does not apply to public employment and that "public-sector unions have become the exploiters."[17] The same view is expressed in a *New York Times* article that describes a nationwide "rising irritation with public employee unions."[18] As Professor Slater chronicles in his article, this "irritation" has intensified since our November 2010 symposium, culminating in several well-publicized state legislative rollbacks in public-sector collective bargaining rights.[19]

This Article explores three particular aspects of the current public-sector crisis. Part I examines the plight of public school teachers and their unions. Part II discusses the recurring nature of public-sector budgetary shortfalls. Finally, Part III looks at attempts by government employers to alter the terms of collective bargaining agreements on a unilateral basis.

I. TEACHERS

While budget and image problems have affected public employees generally, one group not discussed in depth by Professor Slater—public school teachers—has become a particular target of vitriolic attack. Here, the economic problems have been compounded by widespread concerns about the subpar performance of our public education system.

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13. Daniel Kadlec, Sally Donnelly, Karen Bouffard, Sarah Sturmon Dale & Laura A. Locke, *How to Balance a Budget*, TIME, Dec. 9, 2002, at 50.

14. Salaries and wages alone constituted approximately 29.8% of all direct expenditures by the states during the 2001–2002 fiscal year. U.S. CENSUS BUREAU, 2002 CENSUS OF GOVERNMENTS: GOVERNMENT FINANCES 43 tbl.32 (2005), *available at* http://www.census.gov/govs/estimate/0200ussl_1.html; *see also* Clyde Summers, *Bargaining in the Government's Business: Principles and Politics*, 18 U. TOL. L. REV. 265, 266 (1987) (stating that "[l]abor costs may be seventy percent of a city's budget").

15. *See generally* Michael Z. Green, *Unpaid Furloughs and Four-Day Work Weeks: Employer Sympathy or a Call for Collective Employee Action?* 42 CONN. L. REV. 1139 (2010) (discussing employer methods for cutting costs).

16. Editorial, *The Government Pay Boom: America's Most Privileged Class Are Public Union Workers*, WALL ST. J., Mar. 26, 2010, at A18.

17. Tim Pawlenty, Op-Ed., *Government Unions vs. Taxpayers*, WALL ST. J., Dec. 13, 2010, at A19.

18. Michael Powell, *Public Workers Facing Outrage in Budget Crisis*, N.Y. TIMES, Jan. 2, 2011, at A1.

19. Slater, *supra* note 1, at 203–11; *see also* Steven Greenhouse, *Ohio's Anti-Union Law Is Tougher than Wisconsin's*, N.Y. TIMES, Apr. 1, 2011, at A16.

The popular movie *Waiting for "Superman,"* based on a book of the same name, illustrates the growing perception that teachers and their unions stand in the way of meaningful education reform.[20] Teacher unions are widely seen as protecting poorly performing teachers by clinging to the privileges of tenure and by opposing performance-based pay innovations.[21]

Legislative bodies throughout the country are debating reform measures. As of May 2011, seven states had enacted legislation restricting tenure rights or collective bargaining rights for teachers or both, and many others states were considering similar measures.[22] A Florida statute, for example, abolishes tenure for newly hired teachers and mandates that schools implement performance-based evaluation measures.[23] Tennessee took a different tack and replaced its collective bargaining law for teachers with a new statute that provides for "collaborative conferencing."[24]

The push for pay-for-performance reform has not been limited to conservative proponents. The Obama administration itself has joined the effort through its Race to the Top program.[25] In 2010, the Department of Education awarded twelve grants to assist states that propose creative pay-for-performance programs.[26] While some of the most successful programs featured collaboration with teacher unions, the most well-known program was a divisive, top-down redesign engineered by Michelle Rhee, the chancellor of the District of Columbia school system, that left a bad taste in the mouths of many.[27]

The point is not that educational reform is unnecessary or that performance-based teacher evaluation systems are a bad idea. However, our schools suffer from many other problems, including poor funding and the socio-economic obstacles

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20. WAITING FOR "SUPERMAN" (Paramount Vantage 2010); KARL WEBER, WAITING FOR "SUPERMAN": HOW WE CAN SAVE AMERICA'S FAILING PUBLIC SCHOOLS (Karl Weber ed., 2010).

21. *See, e.g.*, Andrew J. Coulson, *The Effects of Teachers Unions on American Education*, 30 CATO J., Winter 2010, at 155 (2010); Evan Thomas & Pat Wingert, *F: Why We Can't Get Rid of Failing Teachers*, NEWSWEEK, Mar. 15, 2010, at 24.

22. *See* Joy Resmovits, *Teacher Tenure Under Fire from Statehouses*, HUFFINGTON POST (May 12, 2011, 5:51 PM), http://www.huffingtonpost.com/2011/05/12/teacher-tenure-under-fire-from-state-legislatiures_n_861279.html.

23. *See* Ron Matus & Jeffrey S. Solochek, *Scott's Signature Changes Teaching*, ST. PETERSBURG TIMES (Florida), Mar. 25, 2011, at 1A.

24. Andrew M. Ballard, *Collective Bargaining: Tennessee Governor Signs Legislation Nixing Collective Bargaining for Teachers*, 49 Gov't Emps. Rel. Rep. (BNA) 724 (June 7, 2011).

25. *See* U.S. DEP'T. OF EDUC., RACE TO THE TOP PROGRAM: EXECUTIVE SUMMARY (2009), *available at* www.ed.gov/programs/race to the top/index.html.

26. U.S. Dep't of Educ., *Nine States and the District of Columbia Win Second Round Race to the Top Grants*, ED.GOV (Aug. 24, 2010), http://www.ed.gov/news/press-releases/nine-states-and-district-columbia-win-second-round-race-top-grants.

27. *See generally* Bill Turque, *District Teachers Approve Contract; Agreement Expands Rhee's Power to Fire and Bases Pay on Results, Not Seniority*, WASH. POST., June 3, 2010, at A1; Michelle Rhee, *What I've Learned; We Can't Keep Politics Out of School Reform. Why I'm Launching a National Movement to Transform Education.*, NEWSWEEK, Dec. 13, 2010, at 36.

faced by students from low-income or immigrant communities.[28] Meaningful educational reform will take place only if teachers and their unions are enlisted as allies rather than demonized as a stand-alone problem.[29]

II. CYCLES OF FISCAL CRISIS

While the severity of the 2010 budget crisis is relatively unique, the existence of public-sector budget crises is not. The most recent crisis constitutes the fourth such period in the last thirty years. In 1982, 1991, 2003–2004, and now in 2009–2011, states and local government units faced similar budget problems.[30] During the first era, in the early 1980s, more than half of the country's 275 biggest cities experienced budget shortfalls.[31] During the second era, in the early 1990s, a majority of the states faced severe fiscal problems.[32] Likewise, in fiscal year 2002, during the third era, thirty-eight states cut budgets by a record $13.7 billion,[33] and the number of budget-cutting states increased to forty in the following year.[34]

The four periods of state budget problems arose from similar causes. Each followed close behind an economic downturn resulting in decreased tax revenues.[35] There is evidence that the states are largely unable to prevent budget shortfalls during cyclical recessions,[36] which is a problem that states are likely to continue to

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28. *See, e.g.*, Christopher Paslay, *Teacher Performance Pay Oversimplifies a Complex Problem*, CHALK & TALK (Apr. 7, 2009, 10:14 AM), http://www.chalkandtalk.wordpress.com/2009/04/07/teacher-performance-pay-oversimplifies-a-complex-problem.html.

29. *See, e.g.*, Rebecca Jones, *Conference Touts Union-District Cooperation*, EDUC. NEWS COLO. (Feb.15, 2011), http://www.ednewscolorado.org/2011/02/15/13910-conference-asks-cant-we-all-just-get-along (discussing a conference that highlighted a dozen school districts that have implemented educational innovations though union-management collaboration).

30. Stephen F. Befort, *Unilateral Alteration of Public Sector Collective Bargaining Agreements and the Contract Clause*, 59 BUFF. L. REV. 1, 9–10 (2011).

31. *See Public Worker Outlook Austere; Fiscal Pressures Are Mounting*, 915 Gov't Emps. Rel. Rep. (BNA) 26–27 (June 1, 1981).

32. Michael deCourcy Hinds, *Revenue Problems Endanger Budgets in Half the States*, N.Y. TIMES, Mar. 4, 1990, § 1, at 1. In all three periods, per capita state tax revenues failed to keep pace with inflation, with the most recent decline being significantly more severe than the previous two. J. Fred Giertz & Seth H. Giertz, *The 2002 Downturn in State Revenues: A Comparative Review and Analysis*, 57 NAT'L TAX J. 111, 115 (2004).

33. NAT'L GOVERNORS ASS'N & NAT'L ASS'N OF STATE BUDGET OFFICERS, THE FISCAL SURVEY OF THE STATES 1 (Dec. 2003), *available at* http://www.nasbo.org/LinkClick.aspx?fileticket=RJYbgySgm2A%3d&tabid=106&mid=566&forcedownload=true.

34. *Id.* at ix. 1. The 2003 deficits were described as the worst state budget crisis in fifty years. *See* Giertz & Giertz, *supra* note 32, at 115; Kadlec et al., *supra* note 13, at 50.

35. *See* Steven D. Gold, *Federal Aid and State Finances*, 35 NAT'L TAX J. 373, 380–81 (1982); Janet G. Stotsky, *Coping with State Budget Deficits*, BUS. REV., Jan–Feb. 1991, at 13; Abby Goodnough, *States Turning to Last Resorts in Budget Crisis*, N.Y. TIMES, June 22, 2009, at A1; David E. Rosenbaum, *The Nation: Quick Change: States Balance Budgets with Blue Smoke and Mirrors*, N.Y. TIMES, Aug. 24, 2003, § 4, at 4.

36. *See* Giertz & Giertz, *supra* note 32, at 112, 129–30.

face in the future.[37] Moreover, political pressures work against responsible planning, such as setting aside "rainy-day" funds, as tax cuts are politically popular when governments run surpluses.[38]

The cyclical nature of these budgetary shortfalls provides both good news and bad news. On the positive side, this means that public-sector budgets eventually will improve as the economy recovers.[39] But it also means that public employment likely will experience recurring bouts of crisis for the foreseeable future. What remains to be seen is whether the current political antipathy focused on public employees also will shift with the economic cycle or whether the Tea Party movement and related phenomena signal a more permanent change in public opinion.

III. UNILATERAL CHANGE AND THE CONTRACT CLAUSE

In the highly unionized public sector, managerial attempts to rein in personnel costs have put stress on the collective bargaining process. Not surprisingly, many public employers have adopted aggressive positions at the bargaining table as a means of coping with fiscal strains.[40] Sometimes, however, governmental entities have taken more drastic measures such as attempting to modify existing contractual agreements on a unilateral basis. In the private sector, such unilateral action would be deemed both a breach of contract remediable in arbitration and an unfair labor practice subject to the jurisdiction of the National Labor Relations Board. Although similar unilateral change rules also exist in most public-sector jurisdictions, such limitations may not apply when a governmental entity with law-making authority, such as a state legislature, enacts a statute or ordinance that trumps the terms of a collective bargaining agreement. If that entity is not a statutory "employer" under the pertinent state statute,[41] the only limitation on the entity's lawmaking authority is the Contract Clause of the U.S. Constitution.[42] Although the Contract Clause

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37. *Id.*; Randall G. Holcombe & Russell S. Sobel, *The Relative Variability of State Income and Sales Taxes over the Revenue Cycle*, 23 ATLANTIC ECON. J. 97, 111 (1995).

38. James A. Papke, *The Response of State-Local Government Taxation to Fiscal Crisis*, 36 NAT'L TAX J. 401, 404 (1983).

39. *But see* Michael Cooper & Mary Williams Walsh, *Mounting Debts by States Stoke Fears of Crisis,* N.Y. TIMES, Dec. 5, 2010, at A1 (stating that some financial analysts are concerned "that even when the economy recovers, the shortfalls will not disappear, because many state and local governments have so much debt . . . that it could overwhelm them in the next few years").

40. *See* Ronald Kramer, *High "C's" Ahead: Public Employer Collective Bargaining, Contractual and Constitutional Hurdles in Concessionary Bargaining*, 42 URB. LAW. 739, 739 (2010); Donald D. Slesnick II & Jennifer K. Poltrock, *Public Sector Bargaining in the Mid-90s (The 1980s Were Challenging, but This Is Ridiculous)—A Union Perspective*, 25 J.L. & EDUC. 661, 662–64 (1996).

41. *See, e.g.*, Stephen F. Befort, *Public Sector Bargaining: Fiscal Crisis and Unilateral Change*, 69 MINN. L. REV. 1221, 1245–46 (1985) (indicating that most public-sector labor relations statutes do not include the state legislature within the definition of a covered public employer).

42. U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . .").

literally proscribes any impairment of contract, the U.S. Supreme Court has long recognized that a state may modify a contract by legislation that is reasonable and necessary to serve an important public purpose.[43] This justification becomes more problematic, however, when a legislative body impairs one of its own contracts for the purpose of reducing its own financial obligations.

In *United States Trust Co. of New York v. New Jersey*, the Supreme Court invalidated a New Jersey statute that retroactively repealed a covenant between the state and certain bondholders that limited the use of revenues pledged as security for rail passenger transportation purposes.[44] In striking down the New Jersey statute, the Court adopted a heightened standard for scrutinizing laws that impair public contracts, stating that "complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake,"[45] and that "a State is not completely free to consider impairing the obligations of its own contracts on a par with other policy alternatives."[46] The impairment of public contracts is constitutional, the *United States Trust Co.* Court stated, only if "reasonable and necessary to serve an important public purpose."[47] The Court noted that an impairment is "reasonable" only if the parties did not foresee at the time of contracting the possibility of changed circumstances[48] and is "necessary" only if there are no less drastic alternatives available for safeguarding the public interest.[49]

The courts have struggled to apply the *United States Trust Co.* standard in cases challenging unilateral alterations of collective bargaining agreements. Three recent decisions illustrate the diversity of viewpoint.

In *Buffalo Teachers Federation v. Tobe*, the Second Circuit Court of Appeals ruled that unilateral action imposed by a legislatively created fiscal authority passed the "reasonable and necessary" test.[50] The court gave substantial deference to the governmental action, stating that "we find no need to second-guess the wisdom of picking the wage freeze over other policy alternatives."[51]

In contrast, the Eighth Circuit Court of Appeals ruled in 2008 that the City of Benton, Arkansas violated the Contract Clause when it unilaterally reduced health care premiums for retired city employees.[52] The court in that case examined the city's plea of financial exigency on a de novo basis and concluded that the city's evidence fell short of establishing the existence of an "unprecedented emergency" or a "broad economic problem" sufficient to warrant the city's unilateral action.[53]

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43. *See, e.g.*, Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 434, 438 (1934).
44. 431 U.S. 1, 9–11, 32 (1977).
45. *Id.* at 26.
46. *Id.* at 30–31.
47. *Id.* at 25.
48. *See id*. at 31–32.
49. *See id*. at 29–31.
50. 464 F.3d 362, 366, 369–73 (2d Cir. 2006).
51. *Id.* at 372.
52. Am. Fed'n of State, Cnty. & Mun. Emps., Local 2957 v. City of Benton, 513 F.3d 874 (8th Cir. 2008).
53. *Id.* at 883–84.

Finally, the Fourth Circuit Court of Appeals, in a 2010 decision, upheld a county's furlough plan that unilaterally reduced work schedules by eighty hours.[54] The Fourth Circuit construed the collective bargaining agreements at issue as incorporating the county's personnel law, which expressly authorizes the adoption of a furlough plan upon the county executive's determination that such a plan is required in order to respond to a shortfall in revenue.[55] The court concluded that since the furlough plan was authorized by the collective agreements, no impairment resulted and an analysis of the reasonable and necessary factors was not required.[56]

Over the past thirty years, more than twenty published decisions have applied Contract Clause analysis to unilateral government actions.[57] Most of these courts have properly applied the principles established by the Supreme Court in the *United States Trust Co.* decision so as to restrict the permissible scope of self-serving legislative modifications. "A significant minority of decisions, however, have afforded substantial deference to such modifications even though they occur[ed] in a context in which the legislative body [was] hardly a disinterested observer."[58] While the legislative impairment of governmental contract rights is a necessary safety valve in some circumstances, an underlying theme of many of the minority decisions is that public-sector collective bargaining agreements are not as worthy of protection as other types of governmental contracts.[59] This view is an undesirable vestige of the discredited notion that public employees owe a duty of "extra loyalty" to the state.[60] In the end, a governmental body should be sustained in impairing its contract obligations to its employees on the same basis as other self-serving impairments; that is, only when such impairment is reasonable and necessary to serve an important governmental purpose.[61]

CONCLUSION

Public employment is currently under siege. The problem is a familiar one. An economic recession depletes anticipated tax revenues resulting in significant budgetary shortfalls. The budgetary woes, in turn, give rise to economic efforts to curtail personnel costs and to political efforts to curtail the rights of public employees and their unions. The political fallout, not atypically, leads to calls for public employees to bear a disproportionate share of the budgetary burden. A common thread in these recurring periods of fiscal crisis is the fact that many still

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54. Fraternal Order of Police Lodge No. 89 v. Prince George's Cnty., 608 F.3d 183 (4th Cir. 2010).

55. *See id.* at 190–91.

56. *See id.* at 188–89; *see also* Prof'l Eng'rs in Cal. Gov't v. Schwarzenegger, 239 P.3d 1186 (Cal. 2010) (concluding that furlough program imposed by governor was authorized by the legislature's reduced appropriation for state employee compensation).

57. *See* Befort, *supra* note 30, at 26–39.

58. *Id.* at 55.

59. *See, e.g.*, Balt. Teachers Union v. Mayor of Balt., 6 F.3d 1012, 1021 (4th Cir. 1993) (stating that "public servants might well be called upon to sacrifice first when the public interest demands sacrifice").

60. *See* Befort, *supra* note 30, at 50–51.

61. *Id.* at 52–55.

think of public employees as having first class obligations, but only second class rights. Ideally, a public-sector budgetary rebound will help to debunk this view.